(2)

No. 04-809

In the Supreme Court of the United States

NORFOLK DREDGING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
DEBORAH A. BYNUM
DOMENIQUE KIRCHNER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that under Section 5501(a)(2)(A)(iii) of the Oceans Act of 1992, Pub. L. 102-587, 106 Stat. 5084 (46 U.S.C. App. 292 note), non-hopper dredges chartered by the Stuyvesant Dredging Company (or by an entity in which it has an ownership interest) may be used in United States waters in certain circumstances other than to supplement or temporarily replace work performed by hopper dredges.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002)	8
Columbian Rope Co. v. *West*, 142 F.3d 1313 (D.C. Cir. 1998)	6
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989)	8
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	8
Iselin v. *United States*, 270 U.S. 245 (1926)	8
Laime v. *United States Tr.*, 540 U.S. 526 (2004)	7, 8, 9
Marine Carriers Corp. v. *Fowler*, 429 F.2d 702 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971)	10
Public Utils. Comm'n v. *FERC*, 236 F.3d 708 (D.C. Cir. 2001)	6
Regan v. *Wald*, 468 U.S. 222 (1984)	8
Russello v. *United States*, 464 U.S. 16 (1983)	8
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1960)	7
Foreign Dredge Act of 1906, ch. 2566 § 1, 34 Stat. 204	2

Statutes and regulation—Continued: Page

Oceans Act of 1992, Pub. L. No. 102-587, Tit. V, 106 Stat. 5039:
§ 5501, 106 Stat. 5084 8
§ 5501(a)(1), 106 Stat. 5084 ..... 2, 5
§ 5501(a)(2):
106 Stat. 5084 ..... 2, 9
106 Stat. 5084-5085 3
§ 5501(a)(2)(A) , 106 Stat. 5084 7
§ 5501(a)(2)(A)(i), 106 Stat. 5084 ..... 4, 6, 7
§ 5501(a)(2)(A)(ii), 106 Stat. 5084 ..... 4, 5, 6, 7, 8
§ 5501(a)(2)(A)(iii), 106 Stat. 5084 ..... 4, 5, 6, 7, 8, 9, 10
Reorganization Plan No. 3 of 1946, 60 Stat. 1097 3
46 U.S.C. App. 292(a)(2) 2
46 U.S.C. App. 292 note 3
46 U.S.C. App. 802 2
46 U.S.C. ch. 121 ..... 4, 5
19 C.F.R.:
Section 177.1(d)(1) 3
Section 177.9 3
48 C.F.R. 9.104-1 3

Miscellaneous:

H.R. 1464, 102d Cong., 1st Sess. (1991) 8, 9
H.R. Rep. No. 260, 102 Cong., 1st Sess. (1991) 8, 9

In the Supreme Court of the United States

No. 04-809

NORFOLK DREDGING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-11a) is reported at 375 F.3d 1106. The initial decision of the Court of Federal Claims is reported at 58 Fed. Cl. 167, and its corrected opinion upon reconsideration (Pet. App. 12a-50a) is reported at 58 Fed. Cl. 741.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2004. A petition for rehearing was denied on August 13, 2004 (Pet. App. 51a). On November 2, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 11, 2004, and the petition was filed on December 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1992, a foreign-built dredge engaging in dredging operations in the United States was subject to forfeiture unless it was documented as a vessel of the United States. Foreign Dredge Act of 1906, ch. 2566, § 1, 34 Stat. 204. That prohibition was amended by Section 5501(a)(1) of the Oceans Act of 1992, Pub. L. No. 102-587, Tit. V, 106 Stat. 5084, which provides that a chartered vessel generally may engage in dredging operations in the navigable waters of the United States only if, *inter alia*, United States citizens own at least 75% of the charterer. 46 U.S.C. App. 292(a)(2), 802. Congress provided in Section 5501(a)(2), however, that the prohibition against foreign ownership does not apply to:

> (A)(i) the vessel STUYVESANT, official number 648540;
>
> (ii) any other hopper dredging vessel documented under chapter 121 of title 46, United States Code before the effective date of this Act and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest; however, this exception expires on December 3, 2022, or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs; and
>
> (iii) any other nonhopper dredging vessel documented under chapter 121 and chartered to Stuyvesant Dredging Company or to an entity in which it has an ownership interest as is necessary (a) to fulfill dredging obligations under a specific contract, including any extension periods; or (b) as

> temporary replacement capacity for a vessel which has become disabled but only for so long as the disability shall last and until the vessel is in a position to fully resume dredging operations; however, this exception expires on December 8, 2022 or when the vessel STUYVESANT ceases to be documented under chapter 121, whichever first occurs.

Pub. L. No. 102-587, 106 Stat. 5084-5085 (46 U.S.C. App. 292 note).

The Bureau of Customs and Border Protection (Customs) is charged with regulating limitations on the use of foreign vessels in United States waters, Reorganization Plan No. 3 of 1946, 60 Stat. 1097. Customs issues letter rulings to interested parties regarding the scope of the exceptions in Section 5501(a)(2). 19 C.F.R. 177.1(d)(1), 177.9.

2. On August 8, 2003, the United States Army Corps of Engineers (the Corps) solicited bids for a fixed-price contract to conduct dredging operations in Morehead City Harbor, Beaufort Harbor, and Brandt Island, North Carolina. Pet. App. 2a, 12a. The Federal Acquisition Regulation (FAR), which was incorporated in the Corps' solicitation, requires that a contractor must "[b]e otherwise qualified and eligible to receive an award under applicable laws and regulations." 48 C.F.R. 9.104-1.

The Corps awarded the contract to the lowest bidder, respondent Bean Stuyvesant L.L.C. (Bean). "Bean is 50% owned by Bean Dredging L.L.C., a U.S. company, and 50% owned by Stuyvesant Dredging Co. ('SDC'), which is in turn wholly owned by a Dutch corporation." Pet. App. 2a. Bean planned to perform the contract by chartering the vessel, the *Meridian*, a U.S.-built, "non-hopper dredge" owned by a U.S. company, Bean Merid-

ian L.L.C. Non-hopper dredges "are unable to store the dredged material on board; the dredged material must be piped to a separate vessel or location," whereas "[h]opper dredges are self-propelled vessels that pump dredged material from the channel floor and store the material in containers called hoppers aboard the vessel." *Ibid.* The *Meridian* possesses a certificate of documentation issued by the U.S. Coast Guard, and is documented under chapter 121 of 46 United States Code.

3. Petitioner, which submitted the second lowest bid for the contract, filed this action in the Court of Federal Claims seeking to enjoin the award of the contract to Bean. Petitioner alleged that Bean could not legally charter the *Meridian*, because Bean is 50% owned by SDC, a foreign corporation, and the vessel could not meet the statutory exceptions for non-hopper dredges delineated in Section 5501(a)(2)(A)(iii). The government and Bean relied on three letter rulings issued by Customs that had concluded that United States documented non-hopper dredges that are fulfilling dredging obligations under a specific contract fall within the plain terms of clause (A)(iii). Pet. App. 17a-19a, 21a-23a.

The Court of Federal Claims enjoined the Corps from proceeding with the performance of the contract with Bean. Pet. App. 12a-50a. The court interpreted clause (A)(iii) as allowing Stuyvesant Dredging Co., or an entity in which it has an interest, to utilize any non-hopper dredging vessel only if its use is "as a temporary replacement for a hopper or non-hopper" or is "supplemental to the dredging activities involving hoppers" that were otherwise qualified under clauses (A)(i) or (ii), *i.e.*, the *Stuyvesant* or hoppers documented as of 1992, the date that the Oceans Act was passed. *Id.* at 35a.

4. The court of appeals reversed and held that Bean met the criteria set forth in clause (A)(iii). Pet. App. 1a-11a. The court of appeals concluded that the trial court "erroneously add[ed] conditions not present in the statutory language." *Id.* at 9a. The court of appeals explained:

> Neither the plain language of exception (A)(iii) nor the structure of the three exceptions pertaining to SDC provides any basis for the [trial] court's conclusion that non-hopper dredges could only be used in a supplemental or replacement capacity to fulfill contracts expressly calling for the services of the vessel STUYVESANT or other hopper vessels documented as of 1992.

Ibid. The court of appeals also found it "telling that exception (A)(ii) specifically requires chartered hopper dredges to be 'documented under 46 U.S.C. ch. 121 before the effective date of this Act,'" which was in 1992, while "[e]xception (A)(iii) lacks a similar clause." Pet. App. 9a (citing § 5501(a)(2)(A)(ii), 106 Stat. 5084).

The court of appeals also rejected petitioner's contention that its interpretation would "cause the exception to swallow the rule." Pet. App. 10a. The court explained that clause (A)(iii) requires that "[t]he non-hopper must be chartered 'to fulfill dredging obligations under a specific contract' or in a 'temporary replacement capacity' for a disabled vessel, and the charter must occur before the exception expires." *Ibid.* (quoting § 5501(a)(2)(A)(iii), 106 Stat. 5084). Because there was no dispute that the *Meridian* met those criteria, the court of appeals reversed the trial court's injunction and remanded with instructions to enter summary judgment in favor of the Corps and Bean. *Id.* at 11a.

ARGUMENT

1. The petition for certiorari should be denied because the case is moot. On August 13, 2004, the court of appeals issued its mandate in conjunction with its denial of a petition for rehearing. On August 16, 2004, the trial court issued a final judgment in favor of Bean and the United States. On August 17, 2004, petitioner moved for a recall of the court of appeals' mandate, which was denied on August 23, 2004. Petitioner did not seek a stay from this Court, and on August 26, 2004, the disputed contract again was awarded to Bean.

We are informed by the Corps that on January 31, 2005, the *Meridian* completed its work under the contract. All the remaining dredging work to be completed under the contract is work being performed by a subcontractor that is utilizing another dredge, which is not the subject of this litigation. Because the *Meridian* has fully performed its work, petitioner's suit, which sought solely injunctive relief (Compl. 4-5), is now moot. See, *e.g.*, *Columbian Rope Co.* v. *West*, 142 F.3d 1313, 1317 (D.C. Cir. 1998); *Public Utils. Comm'n* v. *FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001).

2. In any event, the court of appeals' decision is correct and does not warrant further review by this Court. Petitioner argues that clause (A)(iii) is a "grandfather" clause that permits SDC (or an entity in which it has an ownership interest) to charter non-hopper dredges only when those vessels supplement certain pre-existing hopper dredges or the vessel *Stuyvesant* that would be exempt under clauses (A)(i) and (ii). Pet. 5-24. The court of appeals correctly rejected that extra-textual reading of clause (A)(iii), and the court's holding

comports with the construction of the statute by Customs.

a. Absent an absurd result, the plain language of a statute governs, and courts accordingly may not add provisions that do not appear in the text of the statute. *E.g.*, *Lamie* v. *United States Tr.*, 540 U.S. 526, 533-539 (2004). Those principles are controlling in this case. Section 5501(a)(2)(A) sets forth three independent exceptions with respect to SDC: clause (A)(i) pertains to the vessel *Stuyvesant*; clause (A)(ii) pertains to hopper dredges chartered to SDC before 1992; and clause (A)(iii) pertains to non-hopper dredges used under a specific contract or as a temporary replacement to a disabled vessel. Nothing in the text of clause (A)(iii) requires non-hopper dredges to be supplemental to a qualifying hopper dredge. As the court of appeals held, had Congress intended to impose such a restriction upon SDC's chartering of non-hoppers, it easily could have written one into the statute. Pet. App. 9a.[1]

There also is no reason to believe that Congress meant to tie clause (A)(iii) to the use of hoppers, but simply failed to include such language in that provision. Congress was aware of the different types of dredges, and addressed hopper dredges separately in clause (A)(ii). In contrast, Congress did not include *any* language regarding hoppers in clause (A)(iii). Congress also limited the use of hoppers to those documented

---

[1] Petitioner faults the court of appeals for not citing "a single authority" for the proposition that self-contained clauses separated by a semi-colon are independent. Pet. 20. Petitioner cites no contrary authority, however, and the proposition is unremarkable. *E.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486 (1960) (finding reach of statute "plain" when separate clauses were separated by a semi-colon).

before 1992 in clause (A)(ii), but placed no similar restrictions on non-hoppers in clause (A)(iii). Since Congress included particular language regarding hoppers in subparagraph (A)(ii) and omitted it from (A)(iii), it is "presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Because the statutory language is clear on its face, petitioner errs in relying on the principle that grandfather clauses should be strictly construed. Pet. 22-23. What petitioner seeks is "not * * * a construction of the statute, but in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Lamie*, 540 U.S. at 538 (quoting *Iselin* v. *United States*, 270 U.S. 245, 251 (1926)). Similarly, the plain language of clause (A)(iii) is fatal to petitioner's claim that the legislative history of Section 5501 suggests that the exception protects only those fleets of vessels that existed at the time of the statute's enactment. Pet. 22-25; see *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). Indeed, much of the history cited by petitioner is floor statements or isolated statements by legislators, which are poor indicators of congressional intent. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 457 (2002); *Regan* v. *Wald*, 468 U.S. 222, 237 (1984).

Furthermore, the legislative history cited by petitioner originally arose in the context of an un-enacted House bill, H.R. 1464, 102d Cong., 1st Sess. (1991), that would have limited the exception to only "the vessel STUYVESANT" and would not have allowed SDC to charter or operate any other hopper vessels or non-

hopper vessels. H.R. Rep. No. 260, 102d Cong., 1st Sess. 13 (1991). Later legislative comments regarding protection of existing dredging operations and grandfathering of existing fleets parroted the earlier legislative comments that had been used to describe the rejected bill. Congress repudiated the approach in those comments when it declined to enact H.R. 1464 and instead enacted the broader statutory language contained in Section 5501(a)(2).[2]

Nor is there any basis for arguing that the plain language of the statute produces an absurd result. Cf. *Lamie*, 540 U.S. at 536. Petitioner erroneously argues that reading clause (A)(iii) as written would allow "one clause [to] swallow the remainder of a lengthy and complex statutory provision." Pet. 21. As the court of appeals explained (Pet. App. 10a), clause (A)(iii) contains specific limits, and those limits produce an entirely rational result. Clause (A)(iii) permits SDC to charter non-hopper dredges only as necessary "to fulfill dredging obligations under a specific contract" or in a "temporary replacement capacity," and the charter must occur before the statutory exception expires in 2022, at the latest. Although petitioner speculates that a plain reading of the statutory text could permit "SDC and related entities * * * to dominate the U.S. dredging market," Pet. 13, that implausible hypothetical does not rise to the level of an absurdity.

---

[2] The trial court acknowledged that the legislative history referencing existing fleets or operations was nearly identical to the comments in H.R. Rep. No. 260 with respect to the rejected H.R. 1464. See Pet. App. 45a ("[T]he statement that the 'amendment also includes a grandfather clause to protect existing dredging operations' corresponds most directly to the earlier version of the exception," H.R. 1464, which protected only the *Stuyvesant*).

b. The court of appeals' reading of clause (A)(iii) does not conflict with the decision of any other court of appeals. Petitioner nonetheless argues that this Court's review is warranted because "no circuit split ever can develop on the meaning of the provision" given "the vagaries of Federal Circuit's jurisdiction." Pet. 15-16. Petitioner is mistaken. The Federal Circuit does not have exclusive jurisdiction to review judicial decisions interpreting the scope of clause (A)(iii). Rather, Congress in the first instance vested Customs with the responsibility to construe clause (A)(iii) and, indeed, Customs already has construed clause (A)(iii) consistent with its plain meaning and the decision below. Pet. App. 18a, 24a-25a. Customs' interpretation of the statute is subject to review under the Administrative Procedure Act in district courts and the circuit courts of appeals. See, *e.g.*, *Marine Carriers Corp.* v. *Fowler*, 429 F.2d 702 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971). Accordingly, if petitioner were correct that the issue is one of recurring and substantial importance, the matter would be likely to arise in other courts of appeals upon review of Customs' letter rulings sought by aggrieved parties similarly situated to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
DEBORAH A. BYNUM
DOMENIQUE KIRCHNER
Attorneys

MARCH 2005